HO HUP CONSTRUCTION COMPANY BHD v. WOO THIN CHOY

COURT OF APPEAL, PUTRAJAYA
AZAHAR MOHAMED JCA
LIM YEE LAN JCA
VARGHESE GEORGE JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-216-01-2014]
5 OCTOBER 2015

CIVIL PROCEDURE: *Appeal – Facts, finding of – Interference by appellate court – Whether serious misdirection by trial judge in evaluating evidence – Whether trial judge had misread extent of authority given by plaintiff to defendant and its Deputy Executive Chairman – Whether trial judge had omitted to give sufficient weight to documentary evidence adduced by plaintiff – Trial judge's reliance on statement in the plaintiff's Annual Accounts for 2009 as binding or conclusive against plaintiff's further or continuing interest in missing monies – Whether wholly misplaced – Whether trial judge failed to appreciate and apply correct rules of evidence on burden and onus of proof – Whether appellate intervention necessary*

EVIDENCE: *Witness – Failure to call – Whether trial judge rightly invoked presumption of adverse inference against plaintiff – Whether evidence of witness material to defendant's case*

The plaintiff was a construction company that had been involved in certain works in Madagascar for the Government of Madagascar ('GOM'), while the defendant was the plaintiff's project director until he resigned from the plaintiff's services on 1 April 2010. Disputes arose between the plaintiff and GOM over the contracted construction works. These disputes were referred to the arbitration but subsequently the plaintiff and GOM managed to reach a settlement. The principal terms of the settlement agreement ('SA') were that the arbitration proceedings would be withdrawn and that GOM would release a total sum of USD4 million into the plaintiff's account in two payments, namely the first payment of USD1.5 million upon execution of the SA and the second payment of USD2.5 million within 30 days from the execution of the SA. It was also a term of the agreement that Brilliant Profession Holdings Limited ('BPHL') would handle the terms of the settlement and that the plaintiff would pay BPHL professional fees of USD2.5 million for their services. GOM had paid the full settlement sum of USD4 million into the plaintiff's account. The plaintiff later discovered that the defendant had channeled a sum of USD2.5 million of the settlement sum to himself personally or for his benefit. The plaintiff's investigations brought to light that the defendant had made a cash withdrawal of USD1.5 million from the plaintiff's bank account in Madagascar and transferred a further sum of UDS1 million from the plaintiff's bank account in Malaysia to one Intergood Global Limited ('Intergood'), a company in which the defendant was the sole shareholder and only director. The plaintiff filed a

claim against the defendant for wrongly paying out or receiving for himself the said sum of USD2.5 million. It was the plaintiff's case that the defendant as an employee had breached the fiduciary duty he owed to the plaintiff. Alternatively the plaintiff pleaded that the defendant was at all material times a constructive trustee for those monies for the plaintiff and accordingly was liable to account for and pay that amount to the plaintiff. It was the defendant's defence that BPHL had instructed him to incorporate Intergood to disburse money due to it from the plaintiff. The defendant also submitted that the payments of USD2.5 million from the plaintiff's bank accounts were as per the terms of the SA and had been on the instructions or requests of BPHL. The defendant's contention basically was that he did not commit any breach of fiduciary duties owed to the plaintiff as all his actions were with the approval of Vincent Lye, the Deputy Executive Chairman of the plaintiff (Vincent Lye), when he dealt with the funds of the plaintiff amounting to USD2.5 million. The trial judge found that the cash withdrawal and the payment to Intergood had been authorised by BPHL, and was always known to the plaintiff, since Vincent had been authorised by the plaintiff to finalise the SA. As such, the trial judge concluded that the plaintiff had failed to show with sufficient evidence that the defendant had breached the fiduciary duty he owed to the plaintiff. Consequently, the High Court dismissed the plaintiff's suit. Hence, the present appeal.

Held (allowing the appeal with costs)
Per Varghese George JCA delivering the judgment of the court:

(1) The actual authority given to Vincent Lye and the defendant by the plaintiff's Board of Directors to wrap up the dispute with GOM was to be found in the Board of Directors Resolution immediately preceding the execution of the SA. The wording of the material part of the resolution showed that the extent of the authority given to Vincent Lye and/or the defendant was restricted to discuss, finalise and to execute the SA and all such documents necessary with GOM; there was no authority expressly given which extended to the actual carrying out of the terms of the SA. Significantly there was no provision in this resolution as to BPHL's entitlement to the USD2.5 million or how that was to be effected or implemented. The distinction between a reporting to the Board of the fact of execution of the SA (together with its contents) and the actual authority that was granted to Vincent Lye or the defendant *vide* the Board's related prior resolution, appeared to have been lost on the trial judge. There was no carte blanche approval given by the Board of Directors to Vincent Lye or the defendant and this was a misreading by the trial judge of the authority in them. As such, the trial judge was clearly in error when she generalised and surmised that Vincent Lye and/or the defendant had been vested with wide authority to deal with and handle funds supposedly belonging to BPHL. (paras 27-32)

(2) The trial judge had omitted to give sufficient weight to the available documentary evidence that established the fact that there was no BPHL existing and the defendant had not contested this by any countervailing evidence. The trial court also disregarded without explanation the lack of any corroborative evidence in respect of matters stated in respect of the defendant's claim that BPHL had instructed him to pay out USD1.5 million in cash to the GOM or to incorporate Intergood. In the absence of any other evidence led by the defendant, what had been claimed by him were all mere self-serving statements. Further, the trial judge had failed to recognise the fundamental issue as to whether the USD2.5 million was indeed for or to the account of BPHL in the first place or was the use of the fictitious 'BPHL' a clever device or scheme to deprive the plaintiff of its rightful monies. (paras 33-37)

(3) The trial judge's reliance on the statement in the plaintiff's annual accounts for 2009 as binding or conclusive against the plaintiff's further or continuing interest in those monies was wholly misplaced. The subsequent investigations had unraveled the fact that BPHL was non-existent and was not operating from the alleged address attributed to it and there was a total absence of any written instruction to support the defendant's claim that BPHL had requested for Intergood to be incorporated. Intergood had turned out to be a solely owned defendant's outfit. In the circumstances, the trial judge was clearly wrong to ignore the weight of the evidence supported by documents (not disputed by the defendant), which had been adduced by the plaintiff, and as opposed to that, to just accept the bare oral testimony of the defendant that he was authorised by Vincent Lye to act for BPHL. (paras 38-40)

(4) The trial judge's ruling that the presumption of adverse presumption applied against the plaintiff for not calling Lim Ching Chong, the Group Managing Director of the plaintiff, and/or Vincent Lye to testify on the plaintiff's behalf in this case, showed that she had failed to appreciate and apply the correct rules of evidence on burden and onus of proof. In this case, the court ought to have applied the presumption of adverse inference against the defendant for the non-production of Vincent Lye as his witness and there was no reasonable basis to rule the absence of this witness for the plaintiff, as adverse to the plaintiff's case. It was the defendant who had raised the name of Vincent Lye as the material persona in the lead up to the SA and for the inclusion of 'BPHL' to be paid the alleged USD2.5 million from the agreed settlement sum. As such, it was definitely incumbent on the defendant as the person alleging the existence of those asserted facts to call Vincent Lye in support of the pleaded defence and to further rebut the plaintiff's evidence that had been adduced in court. Vincent Lye's evidence was only material to the defendant's case. The plaintiff had already adduced sufficient evidence, both oral and documentary, to discharge the burden of proof to establish

as facts what had been pleaded in the statement of claim. It was the defendant who failed to discharge the onus on him as required by s. 103 of the Evidence Act 1950. (paras 42-52)

(5) With respect to not calling Lim Ching Choy, it was always open to the defendant to subpoena this witness if it was the view of the defendant that any testimony extracted from this witness would be advantageous to his defence. Thus, it was for the defendant to call this witness if it was his intention to prove that Lim Ching Choy was in any way party to or was fully cognisant with all the surrounding matters, and despite that, had sanctioned those payments to the account of BPHL through Intergood. Thus, the trial judge's ruling that the presumption of adverse inference should operate against the plaintiff for not calling Lim Ching Choy was again unsustainable. (paras 55-58)

(6) The instant case was one where the trial judge seemed to have accepted the sole oral testimony of the defendant as opposed to the weight of evidence backed by the unchallenged documentary material produced in court by the plaintiff. Consequently, this was definitely a case where appellate intervention and reversal of the decision of the trial court was warranted on a re-evaluation of the totality of evidence led before the trial court. (paras 60-63)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif adalah sebuah syarikat pembinaan yang telah terlibat dalam kerja-kerja tertentu di Madagascar untuk Kerajaan Madagascar ('KM') manakala defendan adalah pengarah projek plaintif sehingga dia meletak jawatan daripada perkhidmatan plaintif pada 1 April 2010. Pertelingkahan timbul antara plaintif dan KM terhadap kerja-kerja pembinaan yang dikontrakkan. Pertelingkahan tersebut telah dirujuk kepada timbang tara tetapi plaintif dan KM kemudiannya berjaya mencapai penyelesaian. Terma-terma utama perjanjian penyelesaian ('PP') adalah agar prosiding timbang tara ditarik balik dan supaya KM menyerahkan jumlah keseluruhan wang sebanyak USD4 juta ke dalam akaun plaintif dalam dua pembayaran iaitu pembayaran pertama sebanyak USD1.5 juta atas pelaksanaan PP dan pembayaran kedua sebanyak USD2.5 juta dalam tempoh 30 hari dari pelaksanaan PP. Ia juga merupakan satu terma perjanjian bahawa Brilliant Profession Holdings Limited ('BPHL') akan mengendalikan terma-terma penyelesaian dan bahawa plaintif akan membayar fi profesional BPHL sebanyak USD2.5 juta bagi perkhidmatan mereka. KM telah membayar jumlah keseluruhan penyelesaian sebanyak USD4 juta ke dalam akaun plaintif. Plaintif kemudiannya mendapati bahawa defendan telah menyalurkan sejumlah USD2.5 juta daripada jumlah penyelesaian kepada dirinya secara peribadi atau untuk faedahnya sendiri. Siasatan plaintif menunjukkan bahawa defendan telah membuat pengeluaran wang tunai sebanyak USD1.5 juta daripada bank akaun plaintif di Madagascar dan menyalurkan jumlah

tambahan sebanyak USD1 juta daripada bank akaun plaintif di Malaysia kepada Intergood Global Limited ('Intergood'), sebuah syarikat di mana defendan adalah pemegang saham tunggal dan satu-satunya pengarah. Plaintif memfailkan tuntutan terhadap defendan atas dakwaan bahawa defendan telah secara salah membayar atau menerima untuk dirinya sejumlah USD2.5 juta berkenaan. Adalah kes plaintif bahawa defendan sebagai pekerja telah melakukan pelanggaran kewajipan fidusiari yang ditanggung olehnya terhadap plaintif. Secara alternatif, plaintif memplid bahawa defendan pada setiap masa material adalah pemegang amanah konstruktif bagi wang tersebut untuk plaintif dan dengan demikian bertanggungan untuk menjelaskan dan membayar amaun tersebut kepada plaintif. Adalah pembelaan defendan bahawa BPHL telah mengarahkannya untuk menubuhkan Intergood untuk membayar wang yang terhutang daripada plaintif. Defendan juga berhujah bahawa pembayaran USD2.5 juta daripada akaun bank plaintif adalah seperti terma-terma PP dan atas arahan dan permintaan BPHL. Pertelagahan defendan pada asasnya adalah bahawa dia tidak melakukan apa-apa pelanggaran kewajipan fidusiari yang ditanggung olehnya kepada plaintif kerana kesemua tindakannya itu adalah atas kelulusan Vincent Lye, Timbalan Pengerusi Eksekutif plaintif (Vincent Lye), apabila dia berurusan dengan dana plaintif berjumlah USD2.5 juta. Hakim bicara mendapati bahawa pengeluaran wang tunai dan pembayaran kepada Intergood telah disahkan oleh BPHL dan sentiasa diketahui oleh plaintif kerana Vincent telah diberi kuasa oleh plaintif untuk memuktamadkan PP. Dengan itu, hakim perbicaraan membuat konklusi bahawa plaintif telah gagal untuk menunjukkan dengan keterangan yang mencukupi bahawa defendan telah melanggar kewajipan fidusiari yang ditanggung olehnya kepada plaintif. Oleh yang demikian, Mahkamah Tinggi menolak guaman plaintif. Oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Varghese George HMR menyampaikan kehakiman mahkamah:

(1) Kuasa sebenar yang diberikan kepada Vincent Lye dan defendan oleh lembaga pengarah plaintif untuk menyelesaikan pertelingkahan dengan KM boleh didapati di dalam Resolusi Lembaga Pengarah sejurus sebelum pelaksanaan PP. Perkataan pada bahagian material resolusi menunjukkan takat kuasa diberikan kepada Vincent Lye dan/atau defendan telah dihadkan kepada perbincangan, pemuktamadan dan untuk pelaksanakan PP dan kesemua dokumen-dokumen yang diperlukan dengan KM; tiada kuasa diberikan secara lisan yang merangkumi pelaksanaan terma-terma PP. Hakikatnya, tiada peruntukan dalam resolusi ini mengenai kelayakan BHPL terhadap USD2.5 juta atau bagaimana ia akan dilakukan atau dilaksanakan. Perbezaan antara laporan kepada lembaga mengenai fakta pelaksanaan PP (bersama dengan kandunganya) dan kuasa yang sebenar yang

diberikan kepada Vincent Lye atau defendan melalui resolusi sebelum berkait lembaga, seolah-oleh terhapus kepada hakim bicara. Tiada persetujuan *carte blanche* diberikan oleh Lembaga Pengarah kepada Vincent Lye atau defendan dan ini adalah penyalahtafsiran hakim bicara terhadap kuasa mereka. Dengan itu, hakim perbicaraan jelas terkhilaf apabila membuat kesimpulan dan menduga bahawa Vincent Lyee dan/atau defendan telah diberi kuasa yang luas untuk menangani dan menguruskan dana kepunyaan BPHL.

(2) Hakim bicara terabai dalam mempertimbangkan dengan sewajarnya keterangan dokumentari tersedia ada yang membuktikan fakta ketidakwujudan BPHL dan defendan tidak mempertikaikannya dengan sebarang keterangan timbal balas. Hakim bicara turut mengabaikan tanpa penjelasan kekurangan sebarang keterangan sokongan dalam perkara diutarakan mengenai tuntutan defendan bahawa BPHL telah mengarahkannya untuk membayar USD1.5 juta secara tunai kepada KM atau untuk menubuhkan Intergood. Dalam ketiadaan sebarang keterangan lain diterajui oleh defendan, apa yang dituntut olehnya adalah hanya kenyataan yang mementingkan dirinya samata-mata. Tambahan pula, hakim bicara gagal untuk mengiktiraf isu utama berkenaan sama ada USD2.5 juta itu sebenarnya untuk atau ke akaun BPHL dari awal atau ialah penggunaan rekaan 'BPHL' sebagai pengantara atau skim untuk melucutkan plaintif terhadap wangya yang sah.

(3) Kebergantungan hakim bicara terhadap kenyataan dalam akaun tahunan plaintif bagi tahun 2009 sebagai mengikat atau muktamad terhadap kepentingan lanjut atau berterusan plaintif terhadap wang telah tersalah tempat. Siasatan berikutnya membongkarkan fakta ketidakwujudan BPHL dan bahawa ia tidak beroperasi pada alamat yang dikatakan dan ketiadaan apa-apa arahan bertulis untuk menyokong tuntutan defendan bahawa BPHL telah meminta Intergood untuk ditubuhkan. Intergood kemudiannya didapati adalah kepunyaan perlengkapan defendan yang tunggal. Dalam keadaan ini, hakim bicara terkhilaf dalam mempertimbangkan keterangan yang disokong oleh dokumen-dokumen (tidak dipertikaikan oleh defendan) yang telah dikemukakan oleh plaintif dan bertentangan dengan itu, untuk menerima testimoni lisan kosong defendan semata-mata bahawa dia telah diberi kuasa oleh Vincent Lye untuk bertindak bagi BPHL.

(4) Keputusan hakim bicara bahawa andaian anggapan bertentangan digunakan terhadap plaintif kerana tidak memanggil Lim Ching Chong, Pengarah Urusan Kumpulan plaintif dan/atau Vincent Lye untuk memberi kenyataan bagi pihak plaintif dalam kes ini menunjukkan bahawa beliau telah gagal mempertimbangkan dan menggunakan peraturan keterangan yang betul atas beban dan beban pembuktian. Dalam kes ini, mahkamah sepatutnya menggunakan andaian anggapan

bertentangan terhadap defendan atas ketidakhadiran Vincent Lye sebagai saksinya dan tiada asas munasabah untuk menganggap ketidakhadiran saksi ini bagi plaintif sebagai bertentangan dengan kes plaintif. Ia adalah defendan yang mengutarakan nama Vincent Lye sebagai persona material dalam menerajui PP dan untuk kemasukan 'BPHL' yang akan membayar USD2.5 juta seperti didakwa daripada jumlah penyelesaian yang dipersetujui. Oleh itu, adalah penting bagi defendan sebagai orang yang mendakwa kewujudan fakta yang ditegaskan untuk memanggil Vincent Lye bagi menyokong pembelaan yang diplidkannya dan seterusnya untuk meyangkal keterangan plaintif yang telah dikemukakan di mahkamah. Keterangan Vincent Lye hanya material dalam kes defendan. Plaintif telah mengemukakan keterangan lengkap secara lisan dan dokumentari untuk menolak beban pembuktian untuk dibuktikan sebagai fakta yang telah diplidkan dalam penyata tuntutan. Ia adalah defendan yang gagal untuk melepaskan beban tanggungjawabnya seperti yang termaktub dalam s. 103 Akta Keterangan 1950.

(5) Berkenaan dengan kegagalan memanggil Lim Ching Choy, ia sentiasa terbuka kepada defendan untuk sepina saksi jika adalah pandangan defendan yang sebarang testimoni yang diberikan daripada saksi ini berfaedah untuk pembelaannya. Maka, adalah bagi defendan untuk memanggil saksi jika adalah niatnya untuk membuktikan bahawa Lim Ching Choy sekali-kali sesuatu pihak kepada atau sedar dengan kesemua keadaan perkara dan walaupun demikian telah membenarkan pembayaran kepada akaun BPHL melalui Intergood. Oleh itu, keputusan hakim bicara bahawa anggapan bertentangan harus dikendalikan terhadap plaintif kerana tidak memanggil Lim Ching Choy sekali lagi tidak boleh bertahan.

(6) Ini adalah satu kes di mana hakim bicara seolah-oleh telah menerima testimoni lisan tunggal defendan berbanding mempertimbangkan keterangan yang disokong oleh dokumentari material yang dihasilkan di mahkamah oleh plaintif. Oleh itu, ini pasti satu kes di mana campur tangan rayuan dan mengakas keputusan mahkamah perbicaraan itu adalah wajar terhadap penilaian semula keseluruhan keterangan yang diterajui di mahkamah perbicaraan.

Case(s) referred to:
Aziz Muhamad Din v. PP [1997] 1 CLJ Supp 523 HC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob & Ors [2000] 4 CLJ 324 CA ***(refd)***
International Times & Ors v. Leong Ho Yuen [1980] 1 LNS 31 FC ***(refd)***
Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd [1998] 1 CLJ Supp 147 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 101, 102, 103, 114(g)

A *For the appellant - Gopal Sreenevasan (PL Leong with him); M/s Sreenevasan Young*
For the respondent - Satharuban (S Muralitharan with him); M/s Satha & Co

[Editor's note: For the High Court judgment, please see Ho Hup Construction Company Bhd v. Woo Thin Choy [2014] 1 LNS 652 (overruled).]

B *Reported by Vani Krishnan*

JUDGMENT

Varghese George JCA:

Introduction

C

[1] This appeal was against the High Court's dismissal of the appellant/plaintiff's suit brought against the respondent/defendant to account for and pay a sum of USD2.5 million for breach of fiduciary duties, contractual and/or common law duties owed by the respondent/defendant to the appellant/plaintiff. The parties will be referred to here as they were at the court below.

D

[2] Having considered the submissions of the respective counsel and having perused the records before us, we unanimously allowed the appeal. It was our view that the learned trial judge had failed to properly or sufficiently evaluate the evidence before the court, and in particular, had clearly misdirected herself on the issue of the evidential burden that was on the defendant to prove matters raised in his pleaded defence.

E

[3] We now set out the reasons why appellate intervention was justified in this appeal.

Background

F

[4] The plaintiff, a construction company, had been involved in certain works in Madagascar for the Government of Madagascar (GOM).

[5] The defendant was the plaintiff's project director from 1 December 2008 until 1 April 2010, when the defendant resigned from the plaintiff's services.

G

[6] Certain disputes had arisen in respect of the contracted construction works and an arbitral proceeding had been commenced in Paris between the plaintiff and GOM. It had been subsequently agreed between the plaintiff and GOM to compromise and settle their dispute and this was the subject of a settlement agreement dated 20 June 2009 entered into by both the parties (the SA). The signatory to the SA on behalf of the plaintiff was Vincent Lye Ek Seang, the Deputy Executive Chairman of the plaintiff.

H

[7] The entering into of the SA with GOM had been authorised by the plaintiff's Directors' Circular Resolution dated 5 June 2009 (discussed in detail hereinafter).

I

[8] The principal terms of the settlement with GOM required that: A

(a) The arbitration proceedings be withdrawn; and

(b) GOM release to the plaintiff into the plaintiff's bank account in Madagascar a total sum of USD4.0 million, in the following manner:

(i) USD1.5 million upon execution of the SA; and B

(ii) USD2.5 million within 30 days from the date of execution of the SA.

[9] The SA also contained a further clause in the following terms:

12. The parties agree to engage BRILLIANT PROFESSION HOLDINGS LIMITED to settle all above issues. BRILLIANT PROFESSON HOLDINGS LIMITED shall receive professional fees of USD2.5 million dollars from HO HUP Construction Company Berhad. C

(Brilliant Profession Holdings Limited is hereinafter referred as 'BPHL'). D

[10] There was no dispute that GOM had paid the full settlement sum of USD4.0 million. The plaintiff's claim against the defendant revolved only around a sum of USD2.5 million. According to the plaintiff upon their investigation and related tracing, it had been discovered that: E

(a) A sum of USD1.5 million from the sum deposited in the plaintiff's bank account in Madagascar had been withdrawn in cash and converted into Ariary currency by the defendant on or about 2 July 2009 (cash withdrawal);

(b) A sum of USD1.0 million which had been deposited in plaintiff's bank account in Malaysia had been transferred and paid out to one Intergood Global Limited (Intergood), a company incorporated (on 1 July 2009) in British Virgin Islands (payment to Intergood); and F

(c) A search on Intergood had further disclosed that the defendant was the sole shareholder and only Director of Intergood. G

[11] The plaintiff's claim against the defendant was prosecuted on the basis that the defendant as an employee had breached the fiduciary duty owed by the defendant to the plaintiff in wrongly paying out and/or receiving for himself the aforesaid sums totalling USD2.5 million and/or that the defendant was at all material times a constructive trustee for those monies for the plaintiff and accordingly was liable to account for and pay that amount to the plaintiff. H

[12] The thrust of the defence by the defendant was that the cash withdrawal and the payment to Intergood had been authorised by Vincent Lye and/or was always known to the plaintiff. It was also contended that those payments out from the plaintiff's bank accounts were towards implementation of the aforesaid cl. 12 of the SA and/or had been on the instructions or requests of BPHL. I

[13] The defendant did not dispute that he owed a fiduciary duty to the plaintiff. In the statement of agreed facts (filed at the trial), the defendant agreed that such a duty encompassed *inter alia*, to faithfully and diligently perform his duties and not to make and/or receive any secret profits for himself. However, the defendant denied that he had breached such duty as alleged or that he had misappropriated any monies belonging to the plaintiff.

Trial

[14] Seven witnesses were called by the plaintiff, whilst the defendant was the sole witness for himself.

PW5 (Mr Ronald Leong Vui Khong) was the plaintiff's special projects general manager who was tasked to carry out investigations related to the purported payment of USD2.5 million said to have been made to BPHL. PW2, PW3, PW4 and PW6 were witnesses who were directly involved or assisted in tracing and/or identifying the relevant paper trail particularly with respect to the payments to Intergood (and therefrom to the others as set out in para. 20 below).

[15] PW1 from Secfin Management (KL) Sdn Bhd (Secfin), a Company Secretarial and Corporate Management company, testified as to the matters related to the incorporation of Intergood in British Virgin Islands, and the obtaining of the "Certificate of Incumbency" dated 12 August 2009, both of which had been done at the behest of the defendant. The court was informed that the said certificate was necessary to open bank accounts in the name of Intergood. The payment for the corporate services provided by Secfin was paid by the defendant, also according to PW1.

[16] PW4 (Mr Luk Nirina Andriamady) was the finance manager at the plaintiff's branch office at Antananarivo, Madagascar. He had obtained from the plaintiff's bankers, Bank of Africa there, a copy of the cheque that had been presented by the defendant on 2 July 2009 to withdraw in cash MGA2,875,500,613 (equivalent to USD1.5 million) from the plaintiff's bank account. PW4 also stated that he had asked the defendant for a receipt in respect of that amount withdrawn but the defendant had not provided any such receipt.

PW4 further testified that despite his attempts he was not able to trace any correspondence between the plaintiff and BPHL at the plaintiff's office in Madagascar relating to discussions prior to the settlement being formalised.

[17] PW6 (Mr Ivan Oh Boon Wee) in his testimony stated that about February 2010, he had discovered that the branch accounts of the plaintiff for the branch at Madagascar had reflected a sum of USD1.5 million as an advance extended to the defendant.

[18] PW7 (Mr Guy Alain Ranjatoelina), also from Antananarivo, Madagascar and who was the Managing Director of Societe de Representation Commerciale et de Distribution (SRCD), testified that no company by the name of BPHL had operated from SRCD's premises, which address was also claimed to be that of BPHL. More significantly he adduced formal evidence in the nature of a "Certification of Non-Registration" (certified translation in English) obtained from the relevant Registrar of Companies there attesting to the fact that BPHL was not a company registered in Madagascar.

[19] It must be registered here that there was no dispute of any material nature raised by the defendant to the aforesaid evidence adduced by the plaintiff. More materially, and as also affirmed by the learned trial judge, there was also no challenge to the evidence led by the plaintiff that the defendant was the person who had requested for monies totalling USD1.0 million to be remitted out from the plaintiff's bank account in Malaysia to Intergood's Standard Chartered (Hong Kong) bank account as follows:

– on 30 September 2009		USD150,000
– on 7 October 2009		USD200,000
– on 28 October 2009		USD250,000
– on 18 November 2009		USD250,000
– on 8 January 2010		USD190,000
– on 8 January 2010	(RM34,300) approx.	USD10,000.00
		USD1,000,000

[20] There was also no dispute by the defendant that the USD1.0 million had in turn been disbursed out from the Intergood account as follows:

(a) A sum totalling USD500,000 to defendant's wife Teh Wai Lee (on 4 May 2010 and 24 May 2010);

(b) A sum of USD100,000 to an Indonesian individual (Hasli Maslitan) (on 4 May 2010); and

(c) USD390,000 to one Lifomax Woodbuild Sdn Bhd (on 4 January 2010).

[21] There was no Board of Directors' authorisation or company resolution of any form from the plaintiff for the payments to Intergood or for the subsequent disbursement of the USD1.0 million to the above individuals/ entities, including as it would be noted the sum of USD500,000 to the defendant's wife.

[22] At the trial, the defendant's explanation as regards the cash withdrawal was as follows:

(a) that USD1.5 million was converted into Ariary currency and withdrawn from the plaintiff's bank account in Madagascar to pay the GOM;

(b) that such request to pay the GOM was made by one Andre Haja Resempa to the defendant on behalf of BPHL; and

(c) that he had referred that request from BPHL to Vincent Lye who then instructed him to proceed to act on the request.

[23] As regard the payment to Intergood, the defendant's testimony was as follows:

(a) that BPHL had asked him to incorporate Intergood sometime in October, November, December 2009 to disburse money due to it from the plaintiff;

(b) that Vincent Lye agreed with the defendant to incorporate a vehicle for BPHL;

(c) that BPHL had instructed the defendant to pay the sum of USD1.0 million to Intergood;

(d) Intergood, in turn, carried out BPHL's instructions to disburse the sum of USD990,000 in the following manner:

(i) USD100,000 to an Indonesian, one Hasli Maslitan;

(ii) USD500,000 to the defendant's wife, Teh Wai Lee; and

(iii) USD390,000 to Lifomax Woodbuild Sdn Bhd

(e) that after he had carried out BPHL's instructions in disbursing USD990,000, he returned all of Intergood's documents and paraphernalia.

[24] It was the further testimony of the defendant that the USD500,000 released to his wife was in repayment of an advance extended by him to the plaintiff. The defendant's contention basically was that he did not commit any breach of fiduciary duties owed to the plaintiff as all his actions were with the approval of Vincent Lye, the Deputy Executive Chairman of the plaintiff, when he dealt with the funds of the plaintiff amounting to USD2.5 million.

Decision Of The Learned Trial Judge

[25] The learned trial judge held that the plaintiff had failed to prove their case against the defendant on a balance of probabilities and the reasons for so finding are summarised below:

(a) The terms of the SA itself recognised and acknowledged the payment of USD2.5 million to BPHL as fees for services rendered in facilitating the settlement.

(b) The appointment of BPHL and payment of the fees had been deliberated at a Board Meeting of the plaintiff on 24 June 2009 and the terms of the SA (including the payment to BPHL) had been approved in principle by the plaintiff.

(c) The payment to BPHL had also been recognised in the annual audited accounts of the plaintiff for the years 2009 and 2010.

(d) The incorporation of Intergood, the payment made to Intergood of the sum of USD1.0 million and the disbursements in turn by Intergood to the three parties were all pursuant to instructions of BPHL.

(e) The matters in (d) above were within the knowledge and also authorised by Vincent Lye; impliedly therefore it meant that the plaintiff had knowledge and had approved the same.

(f) The fact that Intergood was incorporated by the defendant was insufficient by itself to support the plaintiff's allegation that the defendant had made secret profits.

(g) All payments made to Intergood and BPHL were approved by Lim Ching Choy, the plaintiff's Group General Manager, and the plaintiff had failed to call Lim Ching Choy to clarify this; accordingly the adverse inference under s. 114(g) of the Evidence Act 1950 should be invoked against the plaintiff.

(h) Intergood was utilised as a vehicle for disbursement of monies due to BPHL after the defendant had a discussion with Vincent Lye, and Vincent Lye had always been authorised by the plaintiff's Board of Directors Resolution of 5 June 2009 to "discuss, negotiate, finalise the agreement and all to execute, sign and deliver for and on behalf of the company the agreement and all such documents as may be necessary to complete the settlement of arbitration …".

(i) The plaintiff bore the burden of calling Vincent Lye an "essential component part" of the decision making authority to testify against the defendant and to prove the plaintiff's case; even if the defendant was under a duty to call Vincent Lye, the court was satisfied that the defendant had made reasonable efforts to serve the subpoena on this witness and the presumption of adverse inference should not therefore be drawn against the defendant.

(j) Although the court agreed that the defendant being an employee of the plaintiff at the material time owed fiduciary duties and obligation to the plaintiff, the plaintiff had failed to show with sufficient evidence that such duty or obligation had been breached.

(k) A constructive trust would only arise if there was a breach of fiduciary duty but there was none here; in any event the plaintiff did not have any longer a proprietary right over the USD2.5 million which had been agreed to be paid to BPHL in any case.

(l) Although the defendant admitted in evidence that the purported payment of USD1.5 million (in cash) which the defendant claimed to have made to GOM was irregular, the court accepted that such payment did not amount to a secret profit that accrued to the defendant.

(m) There was no reason for the defendant to have the sum of USD1.5 million converted into Ariary currency and carted away in seven trucks if it was not meant for the GOM; this payment was in any event acknowledged by a letter of 10 September 2009 from BPHL.

(n) Vincent Lye by the Board Resolution of 5 June 2009, had been mandated by the plaintiff to do all things as may be necessary to complete the settlement of the arbitration and it was reasonable for the defendant to consult and take instruction from Vincent Lye as had been testified by the defendant.

(o) The USD2.5 million was not something that belonged to the plaintiff and therefore the plaintiff had no longer any interest or proprietary right over that sum.

Our Deliberations And Decision

[26] It was clearly discernible from the learned trial judge's reasons enumerated above, that there were two primary underlying basis or lines of thought that influenced the court to dismiss the plaintiff's case. They were:

(a) The payment to BPHL of USD2.5 million for their services to settle the arbitration had been deliberated and approved by the Board of Directors of the plaintiff and, Vincent Lye by the terms of the Board Resolution of 5 June 2009 had been given wide power to carry the settlement through; and

(b) It was incumbent upon the plaintiff to have called both Lim Ching Choy and Vincent Lye as the plaintiff's witnesses. In the absence of their testimony, the explanation of the defendant that he acted on the instructions of BPHL and/or Vincent Lye had to be accepted as good defence to the plaintiff's claim.

[27] In our assessment there was inherent in the reasoning of the learned trial judge a misappreciation of the real issue before the court. Further and more materially, in respect of the treatment of evidence, learned trial judge had in this case departed without justification from the normal and applicable rules of evidence which required the party alleging the existence of a fact to prove that fact.

[28] The learned trial judge referred to the Board of Director's Meeting of 24 June 2009 as deliberating and approving the terms of the SA and thereby attributing approval of the payment of USD2.5 million to BPHL. It must be highlighted that this meeting was subsequent to the execution of the SA

(20 June 2009) and it must be appreciated that this was a reporting of developments by Vincent Lye and/or the defendant. The SA was no doubt approved in principle by the Board but nowhere in that document was a blanket authority given to Vincent Lye and/or the defendant to determine how or in what manner to carry out the so called obligation of the plaintiff to pay BPHL the stated sum of USD2.5 million. One would expect in normal corporate practice in such a scenario for BPHL to raise an invoice or bill or some written manner make a request for payment in order that it could be appropriately processed by the plaintiff. There was no such documentation emanating from BPHL and it was not the defendant's case that there indeed was any such correspondence from BPHL in existence.

[29] What ought not to be overlooked too in this case was the actual authority that had been given to Vincent Lye and the defendant by the plaintiff's Board to wrap up the dispute with GOM. This was found in the Board of Directors Resolution of 5 May 2009, immediately preceding the execution of the SA. The wording of the material part of the Resolution was as follows:

> THAT authority be hereby given to Datuk Lye Ek Seang, a Deputy Executive Chairman or Woo Thin Choy, a Project Director of the Company, to discuss, negotiate, finalise the Agreement and to execute, sign and deliver for and on behalf of the Company the Agreement and all such documents as may be necessary to complete the settlement of Arbitration with full power to assent to any conditions, modifications, variations and/or amendments in any manner as **maybe required in the interest of the Company.**

[30] It was pertinent to note the following:

(a) The extent of the authority given to Vincent Lye and/or the defendant was restricted to discuss, finalise and to execute the agreement and all such documents necessary with GOM; there was no authority expressly given which extended to the actual carrying out of the terms of the SA; and

(b) BPHL was nowhere mentioned in the Board Resolution at all. Significantly, neither was there any provision therein which even remotely affirmed BPHL's entitlement to the USD2.5 million or how that was to be effected or implemented.

[31] The distinction between a reporting to the Board of the fact of execution of the SA (together with its contents) and the actual authority that was granted to Vincent Lye or the defendant *vide* the Board's related prior Resolution, appears to have been lost on the learned trial judge. If it was the intention of the plaintiff through its Board of Directors to grant authority to Vincent Lye or the defendant to go further and assist BPHL and take instruction from BPHL, if at all, to carry into effect the payment agreed (as

stated in the SA) for the benefit of BPHL, then it was reasonable to expect that there ought to have been some definite and specific authority or power given to them for that purpose by the plaintiff.

[32] The learned trial judge was clearly in error when she generalised and surmised that Vincent Lye and/or the defendant had been vested with wide authority to deal with and handle funds supposedly belonging to BPHL. There was no *carte blanche* approval given by the Board of Directors to Vincent Lye or the defendant and this was a misreading by the court of the authority in them. Whatever granted to Vincent Lye was only up to the execution of the SA.

[33] It need also be registered at this point that the unrebutted evidence adduced by the plaintiff were to the following effect:

(a) there was no such legal entity existent by the name of BPHL at all;

(b) there was no documents or any written instruction produced to confirm the purported instructions from BPHL to pay out the USD1.5 million in cash to the GOM (or its Army) or to even incorporate Intergood in the British Virgin Islands and/or the disburse the USD1.0 million from the plaintiff's account in Kuala Lumpur to the defendant's wife and the other two entities, save for the defendant's bare assertions to that effect; and

(c) contrary to the oral testimony of the defendant, Intergood had been incorporated on the instructions of defendant by Secfin on 1 July 2009 and not in October 2009.

[34] The learned trial judge had omitted to give sufficient weight to the available documentary evidence that established the fact that there was no BPHL existent and the defendant had not contested this by any countervailing evidence. The trial court also disregarded without explanation the lack of any corroborative evidence in respect of matters stated in respect of the defendant's claim referred in (b) above. In the absence of any other evidence led by the defendant, what had been claimed by the defendant was all mere self-serving statements.

[35] There was also a more fundamental question at stake here. From the settlement sum of USD4.0 million supposedly receivable by the plaintiff, some USD2.5 million (62.5%) was according to the negotiations undertaken by Vincent Lye to be paid out to a non-existent entity BPHL. It was the defendant's testimony that either he or Vincent Lye had been instructed by BPHL to undertake the cash withdrawal from the plaintiff's account in Madagascar and to effect further payments through "Intergood". There was no acknowledgment however of receipt by BPHL or by any other party of the alleged USD1.5 million. As regards the USD1.0 million it had also been

established on unchallenged evidence that sum did not end up with BPHL at all. (The reference to a 'BHPL letter of 10 September 2009' by the learned trial judge was just that, a reference in an internal memo issued by the defendant himself; the appeal record does not bear such a document and counsel for the defendant did not highlight to us the existence of such a letter which if it was not in the defendant's possession could have been obtained by way of a specific discovery process.)

[36] There was therefore a glaring unexplained black hole whether the USD2.5 million was indeed for or to the account of BPHL in the first place or was use of the fictitious "BPHL" a clever device or scheme to deprive the plaintiff of its rightful monies. The latter of the scenarios above was not totally inconceivable or a remote possibility. This was a reasonable question that ought to have crossed the mind of the court. In the light of all the documented evidence led by the plaintiff, the learned trial judge ought to have required the defendant to adequately displace such possible eventuality. On the hard evidence before the court the balance of probabilities was clearly tilted against the defendant and the court had misdirected itself on that issue.

[37] It must be stressed that the plaintiff's case on the macro level was that the plaintiff had been wrongfully deprived of its monies and the defendant had channelled the so called sums said to be payable to "BPHL" to himself personally or for his benefit. From the discussions above there was no shield or shelter available to the defendant on the seemingly ostensible authority as claimed to have been given to him or Vincent Lye, which as pointed out was nowhere related to or extended to cover the handling of "BPHL's" monies, so to speak.

[38] The learned trial judge further relied on the statements or references found in the plaintiff's audited annual accounts for the year 2009 with respect to the sum of USD2.5 payable to BPHL as indicating the approval of the plaintiff to pay BPHL and/or as confirming that the plaintiff had no longer any claim on the USD2.5 million. Firstly, reference to that document would show that the note to the accounts under the heading "Trade Receivable" was also in the nature of a reporting of the settlement reached with GOM and a recital of the terms and conditions of the SA (including cl. 12) that had been entered into during course of 2009.

Secondly the source of that information had to be of course Vincent Lye, who had been authorised to negotiate and execute the SA. It was not in dispute that Vincent Lye was removed as a director of the plaintiff subsequently on 17 March 2010 and the investigations by the plaintiff that uncovered the scheme perpetrated to deceive the plaintiff of its monies was commenced thereabouts in March 2010 (see evidence of PW5).

[39] In our assessment the learned trial judge's reliance on the statement in the plaintiff's annual accounts for 2009 as binding or conclusive against the plaintiff's further or continuing interest in those monies was wholly

misplaced. The subsequent investigations had unravelled the fact that BPHL was non-existent and was not operating from the alleged address attributed to it. Further there was a total absence of any written instruction to support the defendant's claim that BPHL had requested for Intergood to be incorporated. Intergood had turned out to be a solely owned defendant's outfit.

[40] We agreed with counsel for the plaintiff that the learned trial judge was clearly wrong in the circumstances, to ignore the weight of the evidence supported by documents (not disputed by the defendant) which had been adduced by the plaintiff, and as opposed to that, to just accept the bare oral testimony of the defendant that he was authorised by Vincent Lye to act for BPHL as he did.

Rulings On Adverse Inference

[41] The learned trial judge had refused the plaintiff's application at the close of the trial to apply the presumption of adverse presumption (s. 114(g) of the Evidence Act 1950 (EA)) against the defendant for failing to adduce Vincent Lye as a witness for the defendant's case. On the other hand the learned trial judge ruled that the presumption of adverse presumption applied against the plaintiff for not calling Lim Ching Chong (the Group Managing Director) and/or Vincent Lye to testify on the plaintiff's behalf in this case.

[42] In our considered view, in doing so, the learned trial judge had failed to appreciate and apply the correct rules of evidence on burden and onus of proof and the ensuing evidential obligation on the part of a party asserting the existence of any particular fact to prove that fact. In this case the court ought to have applied the presumption of adverse inference against the defendant for the non-production of Vincent Lye as the defendant's witness. On the other hand, it was our view that there was no reasonable basis to rule the absence of Lim Ching Choy as a witness for the plaintiff, as adverse to the plaintiff's case.

[43] It was trite that while it was true that the overall burden of proving a civil claim on a balance of probabilities was on the party bringing the action (the plaintiff), a party who alleged or relied upon a particular fact had the onus or responsibility to establish on evidence the existence of that fact.

Sections 101, 102 and 103 of the EA (in so far as was material for our decision on this point) was as follows:

> Section 101: Burden of proof
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependant on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

ILLUSTRATIONS

...

...

Section 102: On whom burden of proof lies

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

ILLUSTRATIONS

...

...

Section 103: Burden of proof as to particular fact

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

ILLUSTRATIONS

...

...

[44] The Federal Court per Salleh Abas FJ (as he then was) in *International Times & Ors v. Leong Ho Yuen* [1980] 1 LNS 31; [1980] 2 MLJ 86, observed the position of the law on this issue as follows:

> For the purposes of this appeal it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co v Jatashankar Dossa & Ors* AIR 1961 SC 1474, 1478 and *Raghavamma v. Chechamma* AIR 1964 SC 136, 143). The first sense, signified by the expression burden of proof such as referred to in section 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party which asserts the affirmative of this issue. The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (*Gatley on Libel and Slander*, 7th Ed, paras 351 and 354). The second sense referred to as onus of proof, on the other hand, relates to responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to sections 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail.

[45] This position was clarified by Augustine Paul JC (as he then was) in *Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd* [1998] 1 CLJ Supp 147; [1998] 1 MLJ 697 (HC) in the following words:

> It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies has discharged it, then the evidential burden shifts to the other party (see *UN Pandey v. Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4; *Wong Chong Chow v. Pan-Malaysian Cement Works Bhd* [1980] 2 MLJ 75 and *Johara Bi bte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139). What shifts is the responsibility of adducing evidence to discharge that burden (see *International Times & Ors v. Leong Ho Yuen* [1980] 2 MLJ 86). When the burden shifts to the other party, it can be discharged by cross-examination of witnesses of the party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of the different methods. No adverse inference can be drawn against that party for failure to give evidence himself. If he does not adduce any evidence when the burden has shifted to him, he will fail. If the party on whom the burden lies fails to discharge it, the other party need not call any evidence. In that event, it will not avail him to turn round and say that the respondent has not established his. In such circumstances, as the Privy Council observed in *Raja Chandranath Roy v. Ramjai Mazumdar* 6 BLR 303, the respondent can say: "It is wholly immaterial whether I prove my case or not. You have not proved yours' (see *Selvaduray v. Chinniah* [1939] MLJ 253).

The same learned judge went on to reemphasise the same point in *Aziz Muhamad Din v. Public Prosecutor* [1997] 1 CLJ Supp 523; [1996] 5 MLJ 473 (HC) in the following manner:

> The burden of establishing a case must be contrasted with the burden of introducing evidence (the evidential burden). The former is governed by section 101 of the Act which states ... The latter is governed by section 102 of the Evidence Act 1950 which states ... The burden of establishing a case rests throughout the trial on the party who asserts the affirmative. However, the burden of introducing evidence in a case shifts constantly as evidence is introduced by one side or the other.

[46] We also have the following instructive words of Siti Norma Yaakob JCA (as she then was) affirming that the party who alleges must produce the necessary evidence in proof of it. In *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1; [1996] 3 MLJ 627 it was stated:

> He who alleges must prove such allegation and the onus is on the appellant to do so. See section 103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered, as firstly, the respondent never raised such an allegation and, secondly, has denied

> even making one. For this very reason, the adverse inference under section 114(g) of the Act relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would work against the respondent. There is no obligation in law for the respondent to produce the witness as that obligation rests with the appellant, the party who alleges, and the fact that the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under section 114(g) is invoked against the appellant.

[47] In our view, the starting point to answer the question whether the learned trial judge was correct in the rulings, as Her Ladyship did, was an examination of the two pleadings filed by the parties and their respective allegations therein.

[48] It could not be disputed that the plaintiff had adduced evidence both oral and documentary to prove their several allegations set out in their statement of claim. This had been accepted by the learned trial judge, and in fact, even substantially conceded to by the defendant (as discussed above). The material aspects of the plaintiff's case that had been proved was that USD1.5 million had been drawn out by the defendant personally from the plaintiff's bank account at Madagascar, that the defendant was the originator of the request to the plaintiff for a further sum totalling USD1.0 million to be paid to Intergood, of which company the defendant was the sole shareholder and director at the material time. It was the plaintiff's case that the defendant had misled and/or wrongfully given the impression that the sum of USD2.5 million had been paid to account or on instructions of BPHL, when BPHL was not even a legal entity; further there was no proof BPHL had even rendered any services to the plaintiff.

[49] An examination on other hand, of the statement of defence filed by the defendant would clearly show that it was the defendant who had raised the name of Vincent Lye and another, namely, Andre Haja Resempa, the Secretary General of the President of Madagascar, as the material persona in the lead up to the SA and for the inclusion of "BPHL" to be paid the alleged USD2.5 million from the agreed settlement sum. In his oral testimony the defendant also stated that all the impugned payments out of the plaintiff's monies that he was party to were instructed, authorised and/or done with the knowledge of Vincent Lye. In his testimony in court it was also the defendant's claim that the instructions to incorporate Intergood and to disburse the funds remitted to that company was done by him on the instructions of one Josiane Arinala allegedly of "BPHL", who was not mentioned even in his statement of defence or witness-statement in the first place.

[50] It was definitely incumbent on the defendant as the person alleging the existence of those asserted facts to call Vincent Lye and/or Andre Haja Resempa (and/or even Josiane Arinala) in support of the pleaded defence and

further to rebut the plaintiff's evidence that had been adduced in court. This duty on the defendant was somewhat recognised by the learned trial judge herself but the court went on to however refuse to apply the presumption against the defendant for failing to produce Vincent Lye, the principal witness for the defendant as would appear from the averments in the defendant's own statement of defence, to support/corroborate the defence.

[51] It was clearly not for the plaintiff to secure the attendance of Vincent Lye as the plaintiff's witness. Vincent Lye's evidence was only material to the defendant's case or the defendant's version of matters that had transpired, which he wanted the court to believe. The plaintiff had already adduced sufficient evidence both oral and documentary to discharge the burden of proof to establish as facts what had been pleaded in the statement of claim (ss. 101,102 EA). It was the defendant who failed to discharge the onus on him as required by s. 103 EA.

[52] The learned judge, in our view, treated this evidential obligation on the defendant rather lightly by accepting the defendant's explanation that reasonable efforts had been made to serve the subpoena issued by the defendant on Vincent Lye. The defendant had himself admitted that he had met Vincent Lye here some four to five weeks before he was on the witness stand. The attendance of Vincent Lye as a witness for the defendant to clear critical and crucial questions (as to the legitimacy of the claimed payments to or were on the instruction of BPHL) was imperative.

[53] In our assessment, the court did not act reasonably when it summarily accepted the defendant's excuse for the non-service of the subpoena on Vincent Lye; a statement by the defendant or counsel from the Bar merely to state attempts had been unsuccessfully made to serve ought to have been held as not satisfactory in this regard. The materiality of the likely evidence Vincent Lye or for that matter Andre Haja Resempa, Josiane Arinala to the determination of the issues before the court, particularly in support of the pleaded defence cannot be overstated. It was in the defendant's interest to secure their testimony to rebut the plaintiff's evidence. What should be remembered too was the enormity of the plaintiff's claim against the defendant for some USD2.5 million. The attendance of those named witnesses could have been secured if the defendant was serious about his line of defence. The absence of such possible evidence could only mean that it would have been adverse to the defendant, if adduced.

[54] From another perspective, the issue here was not merely whether the defendant was or was not "suppressing any material evidence" from the court, but the question here was primarily whether the defendant had adduced the best evidence available to prove the claims made by the defendant in his statement of defence. We were of the view that the defendant had failed to discharge that evidential burden and the learned judge was not justified in applying the adverse inference against the plaintiff for the non-production of Vincent Lye.

[55] With respect to Lim Ching Choy, the learned trial judge however, as would be noted from the grounds of judgment, was inclined to readily "... draw an adverse inference against the plaintiff under s. 114(g) (EA) for its failure to call Lim Ching Choy to give evidence in court to support the plaintiff's claim". The first question, in our view, that ought to have been asked was whether it was necessary at all to call Lim Ching Choy to "support" the plaintiff's case. The next question then was, what if any was the material evidence that the plaintiff would have been suppressing by not calling Lim Ching Choy.

[56] Lim Ching Choy was the Group Managing Director of the plaintiff. It was true that the relevant payment vouchers and some other related documents which constituted the paper trail for the payments disbursed out from the Malaysian bank account of the plaintiff to the tune of USD1.0 million, bore the signature/initials of Lim Ching Choy as having approved those payments. These documents to evidence the trail of payment and transfer of funds made to Intergood had already been tendered by PW3, PW5 and PW6 (and admitted without dispute). Even if Lim Ching Choy had been put on the stand, he would have answered that those signature/initials thereto were his and he had approved of the same at that time. It was however beyond any dispute that all of the said payments were initiated/requested for by the defendant by way of internal memos for release of those funds (of 23 September 2009, 6 October 2009, 28 October 2009, 16 November 2009 and 15 December 2009) and addressed to Lim Ching Choy. The defendant was the generator of the process that led to the release of those payments made out from the plaintiff's monies. The aforementioned witnesses for the plaintiff had testified that Lim Ching Choy had instructed it to be attended to based on the written request of the defendant.

[57] In our considered view, it was for the defendant to call Lim Ching Choy if it was the defendant's intention to prove that Lim Ching Choy was in any way party to or was fully cognisant with all the surrounding matters, and despite that, had sanctioned those payments to account of BPHL through Intergood. It must be stressed that the fact that BPHL was a non-existent company and Intergood was a company incorporated by the defendant of which the defendant was the sole shareholder and director, were only discovered upon subsequent investigation by the plaintiff.

[58] It was always open to the defendant to subpoena Ling Chin Choy if the defendant was of the view that any testimony extracted from this witness would be advantageous to the defence case. The plaintiff had adduced sufficient evidence to support their pleaded case through the other witnesses for the plaintiff. In the circumstances the learned trial judge's ruling that presumption of adverse inference should operate against the plaintiff for not calling Lim Ching Choy was not in our view sustainable.

[59] We must also observe here that the sweeping statement of the court in its grounds, namely that: "Intergood was utilised after defendant had a discussion with the then Deputy Executive Chairman of the plaintiff, Datuk Vincent Lye ... there was evidence that Intergood was utilised with the blessings of Datuk Vincent Lye", was purely anchored, it must be reiterated, on the defendant's own bare self-serving testimony in court; there was no other evidence, oral or documentary to corroborate this. This was an example of how the court had fallen in error by not applying the correct rules of evidence. The onus, as discussed above, was obviously on the defendant (not on the plaintiff), to adduce that supporting evidence through Vincent Lye as it formed part of the defendant's own averment in the statement of defence.

Conclusion

[60] There was overwhelming unrebutted evidence, in our assessment, that an amount in Ariary currency equivalent to USD1.5 million had been cashed and taken personally by the defendant from the plaintiff's bank account at Bank of Africa in Madagascar; there was no convincing evidence that this sum had been paid to or acknowledged by any representative of GOM, even if it was on the instructions of "BPKL", as claimed by the defendant.

[61] There was overwhelming evidence too that sums totalling to USD1.0 million was requested for specifically by the defendant and the plaintiff had been induced to release that sum to Intergood.

[62] The plaintiff's evidence that BPHL was a non-existent legal entity and that Intergood was a company incorporated by the defendant and of which the defendant was the sole shareholder remained unrebutted or disproved. Further there was no reasonable explanation why a sum of USD500,000 was ultimately credited by Intergood to the defendant's wife save that it was a repayment of a prior advance to the plaintiff by the defendant; such prior advance in that sum was nowhere documented or shown to have even existed.

[63] This was definitely a case where appellate intervention and reversal of the decision of the trial court was warranted on a re-evaluation of the totality of evidence led before the trial court. Siti Norma Yaakob JCA (as she then was) in *Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob & Ors* [2000] 4 CLJ 324; [2000] 4 MLJ 433 had noted:

> In cases where conflicting evidence are presented before a court, it is the duty of the court not only to weigh such evidence on a balance of probabilities but it also incumbent upon the court to look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact ... He should after accepting the respondent's evidence, weigh it against the contemporaneous documents and evaluate whether such documents support the respondent's oral testimony.

The instant case on appeal before us was one where the learned trial judge seem to have accepted the sole oral testimony of the defendant as opposed to the weight of evidence backed by the unchallenged documentary material produced in court by the plaintiff.

[64] While endorsing the Court of Appeal in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97, the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1, in commenting further on inadequate judicial appreciation of evidence by a trial judge and its susceptibility in such circumstances to intervention by the appellate court had this to say:

> In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. **In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court.** Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected on the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision in an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal.

[65] We therefore allowed the appeal with costs. Accordingly the Order of the High Court was set aside and judgment was entered against the defendant as prayed for in paras. 13.1, 13.2 and 13.3 only of the amended statement of claim.